Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 80-2116

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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WILLIAM ARCHIE WILLIAMS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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Petitioner has brought to the Court's attention the recent decision of the Second Circuit in *United States* v. *Krown*, No. 81-1192 (Apr. 1, 1982), and has filed a supplemental brief that argues that the decision supports contentions made in his previously filed briefs.[1] Even a cursory reading of the opinion demonstrates, however, that it supports the government's arguments in this case.

In *Krown*, the defendants gave three certified checks drawn on a nonexistent bank to a Mrs. Amelar in payment for several shipments of meat. The checks were not, of course, collected, and no one involved in the fraud obtained

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[1]For the convenience of the Court, we have lodged copies of the *Krown* opinion with the Clerk of the Court. Pursuant to Rule 35.5 of the Rules of this Court, we file this supplemental memorandum addressing the Second Circuit's recent decision.

an extension of credit as a result of the checks. "Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookkeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks." Slip op. 4. The defendants were indicted and convicted under various federal fraud statutes, as well as 18 U.S.C. 1014. The fraud convictions were affirmed on appeal, but the convictions based on Section 1014 were reversed.

The Second Circuit observed that a conviction under Section 1014 rests upon "a false statement or overvaluation of security [that has] the purpose of influencing a bank upon an advance, loan, application or commitment." Slip op. 5. The court concluded that "[i]t would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could, under certain circumstances, constitute overvalued security for an advance, loan or commitment." But, while the checks qualified as "false statements" and "overvalued securities," the convictions under Section 1014 were reversed because "there is no basis in the evidence for a finding that [defendants] had the purpose of influencing the bank to use the * * * checks in connection with an advance, loan, application or commitment." Slip op. 6.

The court noted the split of authority as to whether Section 1014 applies to check kiting schemes, but stated that "[i]t is unnecessary for us to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. * * * In the present case there

was no * * * granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014." Slip op. 7-8.

The *Krown* decision supports the arguments made in our brief on the merits. First, the Second Circuit held that a check may constitute a "false statement" or "overvalued security" within the meaning of Section 1014.[2] Second, the Section 1014 convictions were reversed by the Second Circuit only because the checks were not utilized for the purpose of obtaining a "loan, advance or commitment." In the

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[2]The court did not suggest that there is any difference between a certified check and an ordinary check for purposes of determining whether a check contains a "false statement" under Section 1014. Petitioner's argument (Pet. Supp. Br. 3) that a certified check can qualify as a "false statement" while an ordinary check cannot will not withstand analysis. Both types of checks are accepted with the expectation that they will be paid in the ordinary course of collection. Indeed, the fact that a drawer's contractual obligations on a check only arise *after* the check has been first presented to a bank and dishonored underscores the fact that a check is more than a mere promise to pay—it is also a representation that funds are on deposit at a bank to cover the document. See La. Rev. Stat. Ann. § 10:3-413(2) (West Cum. Supp. 1951-1981). As one of the law review articles frequently cited by petitioner states: "the making, drawing, uttering, or delivering a check upon a bank with knowledge that there are insufficient funds or credit for payment in full upon presentation, constitutes the false representation of a present or past fact." Comment, *Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals*, 38 Mo. L. Rev. 432, 433 (1973).

present case, however, this critical element is clearly present. Petitioner kited the checks described in Counts II and III of his indictment for the sole purpose of obtaining an immediate extension of credit. The jury was charged that it could not convict petitioner unless the government proved this element beyond a reasonable doubt (J.A. 36, 37) and the record clearly supports the jury's determination of this factual question (see Gov't Br. 4-6).

## CONCLUSION

For the reasons stated in this memorandum and our brief on the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

APRIL 1982

DOJ-1982-04